IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No.

ILLINOIS COMMERCE COMMISSION, et al,
Petitioners,

vs.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Attorney General of the State of Illinois, as attorney for and on behalf of the Illinois Commerce Commission, an administrative agency of the State of Illinois, which Commission is charged by the laws of said State (Ill. Rev. Stat., 1947, Ch. 111⅔, pars. 1-119.9) with the regulation of public utilities, including those selling natural gas, and, as a matter of law (*Du Bois Englehard & Sons Company*, 231 U. S. 646, 650-652; *New York City v. New York Telephone Company*, 264 U. S. 312, 315-316; *Smith v. Illinois Bell Telephone Co.*, 270 U. S. 587, 592), represents all Illinois

consumers affected by the order in this case (some 60,000 consumers in 37 communities), prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Fifth Circuit to review its order of May 12, 1948, which, in substance, directed that certain impounded funds (amounting to some $2,765,205) be distributed only to the immediate purchasers of the Interstate Natural Gas Company, who were themselves natural gas companies, rather than to the ultimate consumers (R. 109-110).

Certiorari is concurrently being sought in this same matter by the Solicitor General of the United States, on behalf of the Federal Power Commission (No. 109 of this term), and by the Public Service Commission of the State of Missouri (No. 188 of this term), and it may well be that the administrative agencies of various other States and Cities will file similar petitions.

THE OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 103-105) is reported at 166 Fed. (2d) 796.

JURISDICTION.

The order of the Circuit Court of Appeals for the Fifth Circuit was entered on May 12, 1948 (R. 109-112). The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. §§ 347, 350).

A SUMMARY STATEMENT OF THE MATTERS INVOLVED.

On April 27, 1943, the Federal Power Commission (hereinafter called the Commission) ordered the Interstate Natural Gas Company, Incorporated (hereinafter called Interstate) to reduce its rates on and after May 15, 1943, by $1,100,345 per annum as applied to its 1941 volume of sales (3 F.P.C. 416, 432, 434-435) and on June 9, 1943, denied Interstate's petition for rehearing (3 F.P.C. 1018[1]).

On June 14, 1943, Interstate filed in the Circuit Court of Appeals for the Fifth Circuit its petition for a review of so much of the Commissioner's said order as pertained to its rates on sales for resale to the Mississippi River Fuel Corporation (hereinafter called Mississippi) the Southern Natural Gas Company (hereinafter called Southern Natural), and the United Gas Pipe Line Company (hereinafter called United Gas) for resale to the Memphis Natural Gas Company (hereinafter called Memphis) which rates the Commission had found to be excessive in the amount of $596,320 per year.[2] Ancillary to this petition for review, Interstate, on June 14, 1943, sought and was granted a stay of the operation and effect of the said rate reduction order pending review thereof on the condition that Interstate pay into the court's registry the monthly difference between the existing rates and those required by the Commission's rate reduction order (R. 1-2). This stay order placed the entire expense of impounding such funds upon Interstate, and provided that no interest be charged Interstate unless the court so ordered upon subsequent application.

[1] The Commission did, however, modify its order by $8,762 to $1,091,583 and postponed the effective date to June 15, 1943.

[2] By stipulation, Interstate withdrew such of its assignments of error as related to the balance of the Commission's said rate order.

This stay order (R. 2) also expressly provided that:

> "The amounts so deposited shall remain on deposit subject, however, to the further Order or Orders of this Court to be returned to such ultimate consumers of gas, or other persons to whom the Court shall find the same shall be returned, as contemplated by the provisions of the Natural Gas Act. * * *.
>
> * * *
>
> "Full power and jurisdiction is reserved to cancel or modify this Order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers or other parties financially interested in the impounded funds."

Subsequently Interstate's said petition for review was denied (*Interstate Natural Gas Company* v. *Federal Power Commission*, 156 Fed. (2d) 949). On June 16, 1947, this Court affirmed (331 U. S. 682) and on October 13, 1947, this Court denied rehearing (332 U. S. 785).

The reduced rates were finally put into effect commencing with deliveries for the month of October, 1947. Meanwhile, pursuant to the terms of the said stay order, Interstate had deposited some $2,444,573 in the registry of the court and admitted that an additional $320,000, not paid into the registry, was due under the terms of the stay order, making a total to be distributed of some $2,765,205 (R. 43, 52, 75, 110, 111).

On December 18, 1947 Interstate moved the court below for an order distributing the said impounded fund to its four immediate purchasers, Mississippi, Southern Natural, United Gas for sale to Memphis and Memphis (R. 16-19)[3].

[3] The sales of natural gas to United Gas involved in that portion of the Commissioner's order which was reviewed covered the period from June 1, 1943 to December 10, 1945, and were for resale to Memphis (R. 431). Th[illegible]fter, pursuant to a contract between Interstate and Memphis, Mem., [illegible]s made its purchases directly from Interstate.

The said four companies were permitted to and did intervene (R. 42-48, 49-54, 65-67, 67, 71-81). United Gas claimed an allocable share on behalf of Memphis to which it had rebold the gas it had purchased from Interstate (R. 100). The other three purchasers, Mississippi, Southern Natural and Memphis, claimed their allocable share for themselves, and all four urged, relying upon *Central States Co.* v. *City of Muscatine*, 324 U. S. 138 and the unreported *per curiam* decision of the Eighth Circuit in *Panhandle Eastern Pipeline Co.* v. *Federal Power Commission*, that the court had no choice but to distribute the fund to them, subject to whatever rights the ultimate consumers might have under state law.

The present petitioner, Illinois Commerce Commission, and other administrative agencies of other States and Cities, also were permitted to and did intervene (R. 21-41, 67, 68-71, 81-87, 92-95). They and the Commission urged, in opposition to the claims of the four purchasing companies, that the *Central States* decision was not controlling and that the funds in question should be distributed equitably among the ultimate consumers of the gas, from whom such funds had originally been collected, and should not be paid over to the immediate purchasers, who had acted but as intermediaries in the entire transaction of furnishing natural gas to the public. It was also pointed out and urged that the said four immediate purchasers were themselves "natural gas companies" within the scope of the Natural Gas Act, whose rates for transportation and sale at wholesale were not subject to local regulation, and that the various voluntary rate reduction orders entered during the impoundment period showed that these four companies had been and were still earning not less than a reasonable rate of return on their interstate business, without the benefit (windfall) of the impounded excess. The petition of

Illinois Commerce Commission also alleged in detail that a portion of the funds in the custody of the court had originally been contributed by consumers of gas public utility services in the State of Illinois and paid, in the form of rates for such service, to two local Illinois public utility companies under its jurisdiction and control, namely, the Illinois Power Company, and the Union Electric Power Company, of Illinois; and that the natural gas so consumed and paid for by the said Illinois consumers was gas furnished by Interstate through the facilities of Mississippi, which latter corporation acted only as an intermediary which had resold such gas to the aforesaid two Illinois public utilities which had resold it to Illinois consumers. It also tendered the assistance of its technical staff in formulating a plan for the distribution of such funds to the ultimate consumers and pointed out that such distributions to the ultimate consumers has successfully been effected in previous cases such as *Natural Gas Pipeline Company, Colorado Interstate Gas Company* and *Panhandle Eastern Pipe Line Company* (R. 68-69).

The court below, citing only the *Central States* case, held (R. 105) that:

> "whatever may be the rights of ultimate consumers or others to require the pipe line companies who have overpaid Interstate to account to them in respect to such overpayments, it is not our function to search out or declare them. The only appropriate order for this court to enter is one requiring Interstate to repay to the three pipe line companies the moneys which Interstate wrongfully exacted from them under the protection of our order, such distribution to the three pipeline companies, however, to be without prejudice to the rights, if any, of any ultimate consumers or others to hold said companies to account in respect thereof."

The lower court, accordingly, on May 12, 1948, entered its order directing that the said fund be distributed to Interstate's immediate purchasers (R. 109-111).

THE QUESTIONS PRESENTED

The questions presented in the case at bar are in substance as follows:

> Where, as here, (a) a "natural gas company" (Interstate), ancillary to its petition for a review of an order of the Federal Power Commission reducing its wholesale gas rates, secures a stay of the enforcement of such order, conditioned upon its depositing monthly the excess of its charges over the rates as so ordered reduced, the stay order expressly providing that such impounded funds are "to be returned to such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act"; (b) the said petition for review is subsequently denied and such denial is affirmed by this Court; (c) meanwhile, under the provisions of such stay order, a substantial fund (here some $2,765,205) has been impounded; (d) the immediate purchasers (Mississippi, Southern Natural, United Gas and Memphis) are themselves "natural gas companies" within the scope of the Natural Gas Act, whose rates for transportation or sale of natural gas at wholesale in interstate commerce are not subject to State or local regulation; and (e) it appears that such immediate purchasers were at all times receiving at least a fair return without the benefit of such impounded excess:
>
> (1) Does the *Central States* decision, as a matter of law, compel the distribution of the said accumulated fund to Interstate's immediate purchasers rather than to the ultimate consumers of such gas, who originally contributed such funds in the form of excessive charges? And, if so,
>
> (2) Should the said *Central States* decision now be re-examined and either be modified or disapproved?

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that this Court's decision in the said *Central States* case was applicable and controlling under the facts of the case at bar.

(2) In holding that it was required, as a matter of law, to order the distribution of the fund accumulated under its stay order to the immediate purchasers of natural gas from Interstate.

(3) In ordering the distribution of the fund accumulated under its stay order to the immediate purchasers of natural gas from Interstate.

(4) In failing to order that, after appropriate notice and hearings, the funds accumulated under its stay order be distributed directly to the ultimate consumers of such natural gas.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

IN HOLDING THAT IT WAS REQUIRED BY THIS COURT'S DECISION IN THE CENTRAL STATES CASE TO ORDER THE DISTRIBUTION OF THE ACCUMULATED FUNDS TO INTERSTATE'S IMMEDIATE PURCHASERS, THE CIRCUIT COURT OF APPEALS HAS IMPROPERLY EXTENDED THE DOCTRINE OF THAT CASE TO THE DISSIMILAR FACTS OF THE CASE AT BAR AND HAS THEREBY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, PRECISELY SETTLED BY THIS COURT, OR HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

(a) Since in the case at bar, but not in the cited case, the immediate purchasers were themselves "natural gas companies" within the purview of the Natural Gas Act, whose rates for the transportation and sale of natural gas in interstate commerce are not subject to regulation by the States, the Central States case was not applicable or controlling.

(b) Since in the case at bar, but not in the cited case, it affirmatively appears that the immediate purchasers were at all times, during the period of the fund's accumulation receiving at least a fair return, the Central States case was not applicable or controlling.

(c) Since in the case at bar, but not in the cited case, the stay order under which the funds accumulated expressly provided that such funds were "to be returned to such ultimate consumers of gas, or other persons to whom the Court finds the same should be returned, as contemplated by the Natural Gas Act", the Central States case was not applicable or controlling.

(d) The question whether this Court's decision in the Central States case should be extended to cases such as this is a matter which has not been, but should be precisely settled by this Court.

II.

THE CENTRAL STATES CASE, PARTICULARLY IF IT EXTENDS TO CASES SUCH AS THIS, IS INCONSISTENT WITH THE EARLIER DECISIONS OF THIS COURT, DEFEATS THE OBVIOUS INTENT OF THE CONGRESS IN ENACTING THE NATURAL GAS ACT, ENCOURAGES EVEN FRIVOLOUS LITIGATION AND SHOULD NOW BE RE-EXAMINED BY THIS COURT AND EITHER MODIFIED OR DISAPPROVED.

(a) The Central States Case, Particularly If It Extends to Cases Such as This, Is Inconsistent With the Earlier Decisions of This Court.

(1) In proceeding to review rate reduction orders of the Federal Power Commission, the jurisdiction of a Circuit Court of Appeals is not appellate but original in character, and it has the same wide powers commonly exercised by courts of equity hearing suits for injunctions.

(2) Where a fund has been created by virtue of the entry of a stay order by a Federal court, that court acquires

exclusive jurisdiction to adjudicate the rights of all persons claiming any interest in that fund, even though such persons may not have been parties to the original litigation in that court or in privity with such partes.

(b) The Central States Case, Particularly If It Extends to Cases Such as This, Defeats the Obvious Intent of the Congress in Enacting the Natural Gas Act.

(c) The Central States Case, Particularly If It Extends to Cases Such as This, Encourages Even Frivolous Litigation.

(d) The Central States Case, Particularly If It Extends to Cases Such as This, Should Now Be Re-examined by This Court and Either Modified or Disapproved.

The foregoing reasons for granting the writ are more fully developed in the appended brief in support of this petition (*ante*, pp. 12-36).

CONCLUSION.

For the reasons above stated, the Illinois Commerce Commission, petitioner herein, prays that this petition for a writ of *certiorari* be granted, and that a writ of *certiorari* issue to the Circuit Court of Appeals for the Fifth Circuit to review its order of May 12, 1948, in *Interstate Natural Gas Company, Incorporated, v. Federal Power Commission, et al.*, its Docket No. 10,701.

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BRIEF IN SUPPORT OF THE FOREGOING PETITION.

I.

IN HOLDING THAT IT WAS REQUIRED BY THIS COURT'S DECISION IN THE CENTRAL STATES CASE TO ORDER THE DISTRIBUTION OF THE ACCUMULATED FUNDS TO INTERSTATE'S IMMEDIATE PURCHASERS, THE CIRCUIT COURT OF APPEALS HAS IMPROPERLY EXTENDED THE DOCTRINE OF THAT CASE TO THE DISSIMILAR FACTS OF THE CASE AT BAR AND HAS THEREBY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, PRECISELY SETTLED BY THIS COURT, OR HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

(a) Since in the case at bar, but not in the cited case, the immediate purchasers were themselves "natural gas companies" within the purview of the Natural Gas Act, whose rates for the transportation and sale of natural gas in interstate commerce are not subject to regulation by the States, the Central States case was not applicable or controlling.

The court below, in holding that it was required by *Central States Electric Co. v. City of Muscatine*, 324 U. S. 138, to order the distribution of the accumulated fund to Interstate's immediate purchasers, improperly extended the *Central States* case to the dissimilar facts of the case at bar.

In the *Central States* case, this Court held that a federal court had no power to determine whether the funds accumu-

lated pursuant to its stay order, pending review of a Commission order directing a "natural-gas company" to reduce its rates, belonged to the local distributing company purchasing gas from the natural gas company or to its customers, "that being a legislative function of the State of Iowa" (pp. 143-144). In that case, the immediate purchaser was a local distributing company, subject to regulation, if at all, only in accordance with local Iowa law. The Natural Gas Act, this Court there pointed out, left to "the states the function of regulating the intrastate distribution and sale" (p. 144).

The question in this case is whether the *Central States* decision applies where the immediate purchasers are themselves "natural gas companies" within the meaning of, and subject to the Natural Gas Act, and deprives the federal court, which stayed the Commission's order, of authority to distribute the accumulated fund to any one but these immediate purchasers.[1] Nothing in the rationale of the *Central States* decision requires such a result. For in this case the question does not arise out of conflicting claims of

[1] If it is not deemed mandatory to distribute the impounded fund to the immediate purchasers, a substantial proportion of the fund will probably reach the ultimate consumers. The West Tennessee Gas Company, one of the distributing companies purchasing gas from Memphis, voluntarily filed a disclaimer of its allocable share (R. 86-87) and the intervention of the Missouri Public Service Commission stated that Laclede Gas Light Company would also disclaim its share in favor of its ultimate consumers (R. 93-94). When the *United Gas* costs were reduced by Interstate's compliance with the Commission's order here involved, in so far as it pertained to gas sold to United Gas for resale in the New Orleans area, United Gas voluntarily lowered its rates to pass on the entire amount of this reduction to local distributing companies which in turn passed it on to ultimate consumers. *Interstate Natural Gas Co., Inc., La. Public Service Commission* v. *Interstate Natural Gas Co., Inc., et al.*, F.P.C. Docket Nos G-149 and G-132, Order of June 26, 1944.

Experience in other similar distribution proceedings where the percentage of disclaimers, although progressively decreasing, has until this case usually been very high (e.g., 99.5% of the fund disclaimed in the *Natural Gas Pipeline* refund, which was the first such proceeding, and which gave rise to the *Central States* case; 80% in the *Panhandle* refund proceeding), also indicates that other distributing companies would probably also disclaim. The two Illinois distributing companies involved, viz.: Illinois Power Company and Union Electric Power Company, have stated their intention to disclaim all interest in the fund.

a local distributing company and its customers, a matter which this Court treated as being subject to state control. Rather, the immediate purchasers here are themselves "natural gas companies" engaged in transportation or sale at wholesale of natural gas in interstate commerce which is subject to regulation only by the Commission. *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498.[5] These activities are not local in character and, even in the absence of Congressional action, are not subject to state regulation. *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Commission* v. *United Gas Co.*, 317 U. S. 456; *Interstate Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 689; cf. *Public Utilities Commission* v. *Attlebora Steam Co.*, 273 U. S. 83. It was the very absence of state regulatory power in this field that impelled Congress to enact the Natural Gas Act in 1938. H. Rep. No. 709, 75th Cong., 1st sess., p. 2; *Interstate Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 690; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610.

There is no question of local law here involved, at least in regard to the claims of Interstate's immediate purchasers as against the more remote purchasers. As between the immediate purchasers and more remote purchasers who resell, the only question is the reasonableness of the return enjoyed by "natural gas companies"—not a question of local law. Nor could a local law question arise if the claimants were immediate purchasers and more remote purchasers who do not resell (i. e., ultimate con-

[5] The immediate purchasers' sales to industrial consumers are, of course, not subject to the Commission's jurisdiction. See Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b); *Colorado Interstate Co.* v. *Federal Power Commission*, 324 U. S. 581. Since this Court's decision in *Panhandle Eastern Pipeline Co.* v. *Public Service Commission*, 332 U. S. 507, various state commissions have indicated an intention to assert jurisdiction over these industrial sales. We do not suggest that the distinctions urged in the text of this petition are applicable to any portion of the impounded fund allocable to these industrial sales.

sumers) because that situation would come into being only when the company selling to the ultimate consumers has disclaimed and thereby eliminated the local law question. Hence there could have been no interference with the rate regulatory jurisdiction of any state if the court below had refused to distribute the accumulated fund to Interstate's customers.[6]

The consequence is not only that the states have no authority over the funds impounded in this case. Unless the court below can order the sum distributed to persons other than the immediate purchasers, presumably to the ultimate consumers to whom the overcharges had apparently been passed on, there is no way in which the intermediate "natural gas companies" can be prevented from retaining an undeserved windfall. For despite the nominal preservation by the court below "of the rights, if any, of the ultimate consumers or others to hold said companies to account in respect" of the accumulated fund,[7] no power resides in any person or tribunal to compel these companies to pass on either to ultimate consumers or distributing

[6] The court below, we believe, could properly have permitted the filing of claims in opposition to those of the immediate purchasers, and ordered the distribution of the impounded funds in accordance with the respective merits of these claims. Cf. *United States* v. *Morgan*, 307 U. S. 183, 197; *Inland Steel Co.* v. *United States*, 306 U. S. 153, 157; *Central States Co* v. *City of Muscatine*, 324 U. S. 138, 146 (dissenting opinion). If any complicated economic or accounting questions had arisen in connection with the reasonableness of rate charged during the impoundment period, the Commission could have provided the Court with any assistance it needed. Cf. *United States* v. *Morgan*, *supra*; *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 312-313; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618-619. The Illinois Commission, which has had wide experience in such refunds, also tendered the assistance of its technical staff (R. 68-69).

[7] It is interesting to note in this connection that no further legal proceedings were instituted as the result of the preservation of a similar right in the *Central States* case. Nor, for that matter, has anything happened as the result of the reservation of such rights in the unreported proceedings in the Eighth Circuit in the *Panhandle* distribution. This is in part due to the fact that, typically, state commissions, as the Commission here, have no retroactive rate jurisdiction or reparation power.

companies any of the monies to be contributed to them. There is no privity between these companies and the ultimate consumers as the ultimate consumers purchase from the distributing companies. The distributing companies are without legal rights on the premises, since the rates charged them during the impoundment period were legal rates which must be charged all customers. Section 4(e) of the Natural Gas Act, 15 U. S. C. 717c(e); cf. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370, 384. And the Commission is without power to affect these rates since it is without jurisdiction to fix retroactive rates or issue reparation orders. Section 5 of the Natural Gas Act, 15 U. S. C. 717d; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591; cf. *Public Utilities Commission* v. *United Gas Co.*, 317 U. S. 456. For that reason, the Commission may not require the companies to pass on the benefits of the stay order. Similarly, under the decisions of this Court, the state regulatory commissions are powerless to compel these companies to disgorge that portion of the refund attributable to their interstate sales of gas at wholesale. *Public Utilities Commission* v. *United Gas Co.*, *supra*, at 468; *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298; cf. *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83; *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498.

Thus the result of the extension of the *Central States* case is to take the excess over the fair return allowed by the Commission from one "natural gas company" and give it to another which is already earning a fair return. It effectively denies all return to the ultimate consumers of the overcharges paid by them for four years while the courts were affirming the reduction ordered for their benefits.

In view of these considerations, it is respectfully submitted that since in the case at bar, but *not* in the *cited*

case, the immediate purchasers were themselves "natural gas companies" within the purview of the Natural Gas Act, whose rates for the transportation and sale of natural gas in interstate commerce are not subject to regulation by the States, the *Central States* case was *not* applicable or controlling.

(b) Since in the case at bar, but not in the cited case, it affirmatively appears that the immediate purchasers were at all times, during the period of the fund's accumulation receiving at least a fair return, the Central States case was not applicable or controlling.

In the *Central States* case, the distributing company claiming its allocable share contended that it had not earned a fair return on its investment during the impoundment period and, accordingly, it was doubtful whether the company would have passed the benefits of the reduced rates on to its customers. In the present case, however, the Commission, immediately before the issuance of the Interstate rate order and while it was suspended during the four years that it was being reviewed, investigated into the reasonableness of the rates charged by United Gas, Memphis, Mississippi, and Southern Natural, found them unreasonably high, and either ordered them reduced to reasonable levels or secured voluntary reductions to such levels. In determining what those rates should be, the Commission did not, however, with respect to the period before the affirmance of the Interstate rate order, include the reduction in the cost of purchased gas which would result when and if that order was sustained. *United Gas Pipe Line Co.*, 3 F. P. C. 402;[8] *Memphis Natural Gas Co.*,

[8] As the result of conferences with the Commission, United Gas, on April 1, 1943, filed amendatory contracts affecting a reduction of rates for resale gas in the sum of $2,195,287, annually, based upon its 1942 revenues: 3 F.P.C. 402.

3 F. P. C. 566;[9] *Southern Natural Gas Co.*, 5 F. P. C. 427, 662 (order allowing rate schedules);[10] *Mississippi River Fuel Corp.*, 4 F. P. C. 340, 363.[11] If the Interstate order had not been stayed, the reduction in its rates would at once have been reflected in reduced operating expenses of its immediate purchasers. The formula used by the Commission in determining the rates of those purchaser companies necessarily would have resulted in additional reductions of their rates but for the stay order. Cf. *In the Matter of Mississippi River Fuel Corp.*, 4 F. P. C. 340, 359, 363.

In view of these considerations, it is respectfully submitted that since in the case at bar, but *not* in the *cited* case, it affirmatively appears that the immediate purchasers were at all times during the period of the fund's accumulation receiving at least a fair return, the *Central States* was *not* applicable or controlling.

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[9] The Commission, as the result of conferences with Memphis, issued an opinion dated September 21, 1943, more than five months after the Interstate order, accepting as of July 26, 1943, new rate schedules, which as applied to 1942, reduced Memphis' revenues by about $350,000. 3 F.P.C. 566. The Commission's opinion pointed out that the company's representatives had stated that any future benefit the company might receive by reason of the Interstate Order would be passed on to its customers. 3 F.P.C. at 570. In the court below, the company disputed the correctness of that statement. In 1946, Memphis filed new schedules increasing its rates. Various of its customers protested the increase and the Commission suspended the new rates. 5 F.P.C. 946. Memphis subsequently withdrew its proposed schedules.

[10] The Southern Natural order was entered on July 19, 1946, pursuant to a stipulation between the Commission and the company, and required the company to file new rate schedules which, as applied to its sales for the year ending December 31, 1945, would reduce revenues by $1,200,000.

[11] The Mississippi order, entered November 9, 1945, required the company to reduce it revenue on regulable business by aproximately $950,000 as applied to the test year 1943. After judicial review and remand of the case to the Commission (163 F. 2d 433 (App. D. C.)), the company and the Commission entered into a stipulation on May 4, 1948, whereby the Commission was to dismiss its rate investigation against the company, and Mississippi in turn accepted a rate reduction of about $850,000, and further agreed to give effect to that portion of the Interstate rate order accruing since January 20, 1946. No express proviso was made for that portion which had accrued previously, and presumably it was to be disposed of as the courts should direct.

(c) Since in the case at bar, but not in the cited case, the stay order under which the funds accumulated expressly provided that such funds were "to be returned to such ultimate consumers of gas, or other persons to whom the Court finds the same should be returned, as contemplated by the Natural Gas Act", the Central States case was not applicable or controlling.

This Court's decision in the *Central States* case is also clearly distinguishable by the fact that the terms of the stay orders involved are fundamentally different. In the *Central States* case, the stay order provided for the filing of a bond to secure the refund to the purchasers at wholesale, i. e., the immediate purchasers to whom this Court subsequently found the money should be distributed. In contrast, the order here involved recognized that the ultimate consumers had a fundamental claim in the impounded fund and the court apparently intended, when it entered that stay, to distribute the fund to the ultimate consumers, barring unforeseen contingencies. It provided that the fund should be returned to "such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act," and further it reserved to itself full jurisdiction to cancel or modify the order "to protect or to promote the rights and interests * * * of the ultimate consumers or other parties financially interested in the impounded fund."

As a matter of fact, the terms of the stay order in the case at bar are far more analogous to those involved in the case of *Ex parte Lincoln Gas & Electric Co.*, 256 U. S. 512, where this Court, at pages 516-518, said:

> *"The bond recognized that the city and its officials, who were the nominal parties defendant, were in a broad sense the representatives of the consumers, the*

parties actually concerned. It recognized that they were required to pay a rate for gas higher than the city ordinance had determined to be just and reasonable; that these excess charges were being exacted pending the suit, in order that the company might be secure in the event that it should prevail, and per contra, that they ought to be refunded with interest, in the event that it should fail. It recognized that the customers were so many in number, and the difficulty of sustaining their individual claims through separate suits would be so great, that to remit them to such suits would be a virtual denial of justice. And it recognized that to ascertain what should be due to them, to see to its collection from the Company in case of its failure to make good its attack upon the ordinance, and to cause distribution to be made among the several claimants, was essential to the doing of complete equity, and therefore a natural incident to the jurisdiction of the court in the main cause to retain jurisdiction for the purpose of requiring that restitution be made according to the terms of the bond was and is a necessary part of the duty of the District Court under the mandate.

"The case is within the principle of *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 143-147.

"The contention that the jurisdiction fails because the consumers were not parties to the record nor in privity with the parties, and the company prayed no relief against them, is transparently unsound. The ordinance was intended to limit the gas rate for the benefit of the consumers; suit was brought against the municipality and its officers as the public representatives of the interests of the consumers; the restraining order and temporary injunction were intended for the very purpose of enabling the company to exact, pending suit, rates in excess of those limited by the ordinance; the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers; *and the form of the supersedeas bond recognized all this, and was particularly designed for their protection.*" (Emphasis added.)

In view of these considerations, it is respectfully submitted that since in the case at bar, but *not* in the *cited* case, the stay order under which the funds accumulated expressly provided that such funds were "to be returned to such ultimate consumers of gas, or other persons to whom the Court finds the same should be returned, as contemplated by the Natural Gas Act," the *Central States* case was *not* applicable or controlling.

(d) The question whether this Court's decision in the Central States case should be extended to cases such as this is a matter which has not been, but should be precisely settled by this Court.

In this type of case not only huge sums (in *Panhandle Eastern Pipeline* some $25,000,000; in *Natural Gas Pipeline* some $6,350,000; *here* some $2,765,000) but many thousands of ultimate consumers (in *Natural Gas Pipeline* some 1,000,000; *here* some 60,000 in Illinois alone) are affected by the ultimate decision of the Circuit Court of Appeals in distributing the accumulated funds.

Such proceedings (*Natural Gas Pipeline, Panhandle Eastern Pipeline* and *Colorado Interstate Gas Co.,*) have been before the Seventh, Eighth and Nine Circuits respectively; and, in each of those cases, the accumulated funds were successfully refunded to the ultimate customers although funds far larger and interests far more conflicting than those in the case at bar were involved.

If the doctrine of the *Central States* case is now to be extended to cases such as this, thus leaving the ultimate consumers, State agencies and the Commission alike completely without a remedy to prevent such an obvious injustice and perversion of the Natural Gas Act, then the question is of such importance that it should be authoritatively settled by this Court, not by any Circuit Court of Appeals.

It is therefore most respectfully submitted that in holding that it was required by this Court's decision in the *Central States* case to order the distribution of the accumulated funds to the immediate purchasers, the Circuit Court of Appeals has improperly extended the doctrine of that case to the dissimilar facts of the case at bar and has thereby decided an important question of federal law which has *not* been, but *should be*, precisely settled by this Court, or has decided a federal question of substance in a way probably in conflict with applicable decisions of this Court.

II.

THE CENTRAL STATES CASE, PARTICULARLY IF IT EXTENDS TO CASES SUCH AS THIS, IS INCONSISTENT WITH THE EARLIER DECISIONS OF THIS COURT, DEFEATS THE OBVIOUS INTENT OF THE CONGRESS IN ENACTING THE NATURAL GAS ACT, ENCOURAGES EVEN FRIVOLOUS LITIGATION AND SHOULD NOW BE REEXAMINED BY THIS COURT AND EITHER MODIFIED OR DISAPPROVED.

(a) The Central States Case, Particularly If It Extends to Cases Such as This, Is Inconsistent With the Earlier Decisions of This Court.

(1) In proceeding to review rate reduction orders of the Federal Power Commission, the jurisdiction of a Circuit Court of Appeals is not appellate but original in character, and it has the same wide powers commonly exercised by courts of equity hearing suits for injunctions.

It might, perhaps, be thought that because this type of action is instituted in a Circuit Court of Appeals, the jurisdiction of that court is purely appellate in character

and might, therefore, be more restricted than that jurisdiction usually exercised by a trial court reviewing an administrative order on common law *certiorari*, or hearing a suit for an injunction against the enforcement of an administrative order.

An examination of the relevant authorities discloses that such is *not* the case and that, despite the *rank* of such court, it sits on review of such orders as a court of *original* jurisdiction, and has all of the wide powers usually exercised by such trial courts.

Montgomery's Manual of Federal Jurisdiction and Procedure, 4th Ed., 1942, pp. 897, 906, states the general principles as follows:

> "In respect of orders of federal boards and commissions, the jurisdiction of the circuit courts of appeals is *original* rather than appellate." (Citing *Butterick Co.* v. *Federal Trade Commission* (2 Cir., 1925), 4 F. (2d) 910, 913.) * * *
>
> "In respect of orders of federal boards and commissions, the jurisdiction of the circuit courts of appeals is *original* rather than appellate; and hence the courts may, by their own decrees, protect the rights, and in such form as is enforcible by them. Such a decree is similar to that of a *court of equity in an injunction* suit." (Citing *Butterick Co.* v. *Federal Trade Commission* (2 Cir., 1925), 4 F. (2d) 910, 913; *L. B. Silver* v. *Federal Trade Commission* (6 Cir., 1923), 292 F. 752. But see *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission of U. S.* (8 Cir., 1922), 280 F. 45, 46.) (Emphasis added.)

In the case of *Federal Trade Commission* v. *Balme*, 23 Fed. (2) 615 (C. C. A., 2nd, 1928), cer. den. 277 U. S. 598, the Circuit Court of Appeals, in speaking of the affect of the very similar review provisions of the Federal Trade Commission Act, said, at page 618:

> "The Federal Trade Commission Act confers special statutory jurisdiction, and the extent of such jurisdic-

tion and the conditions of its exercise over subjects or persons must necessarily depend upon the terms in which the jurisdiction is thus conferred. *It does not depend upon the rank of the court upon which it is conferred.* * * * But, under the act, the jurisdiction of the court is *original.*, *Butterick Co.* v. *Federal Trade Commission* (C. C. A.), 4 F. (2d) 910." (Emphasis added.)

In the case of *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, this Court, in discussing the powers of a Circuit Court of Appeals under the review provisions of the National Labor Relations Act (which are practically identical with those of the Natural Gas Act here involved), said, at page 373:

> "The jurisdiction to review the orders of the Labor Relations Board is vested in a court *with equity powers*, and while the court must act within the bounds of the statute, and without intruding upon the administrative province, *it may adjust its relief to the exigencies of the case in accordance with the requitable principles governing judicial action.* The purpose of the judicial review is consonant with that of the administrative proceedings itself,—to secure a just result with a minimum of technical requirements." (Emphasis added.)

In the case of *United States* v. *Morgan*, 307 U. S. 183, where a fund had accrued by virtue of a court action suspending an order of the Secretary of Agriculture, this Court, at page 191, said:

> "* * * in reviewing the action of the Secretary and in similarly reviewing the action of the Interstate Commerce Commission in conformity with the provisions of the Urgent Deficiencies Act, the district court sits as a court of equity, see *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 373; *Inland Steel Co.* v. *United States*, 306 U. S. 153; and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to

> be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles."

In view of the statutory provisions here involved and the legal principles applicable thereto, it is respectfully submitted that the powers of a Circuit Court of Appeals in connection with such review proceedings are fully as wide as those of any federal trial court sitting in equity, and are not limited to the powers usually exercised by purely appellate tribunals.

(2) Where a fund has been created by virtue of the entry of a stay order by a Federal court, that court acquires exclusive jurisdiction to adjudicate the rights of all persons claiming any interest in that fund, even though such persons may not have been parties to the original litigation in that court or in privity with such parties.

The authors of Corpus Juris, at pages 626 and 697 of Volume 25, state the general principles as follows:

> "**Ancillary and Incidental Jurisdiction.** Where a federal court has jurisdiction of the cause of action and of the parties, it may have jurisdiction also of a suit or proceeding which is a continuation of, or incidental and ancillary to, the former suit, although it might not have jurisdiction of the latter, if it were an original action. (Citing numerous cases.) * * * the fact that such jurisdiction is ancillary merely does not preclude its exercise over persons not parties to the judgment sought to be enforced."

In the case of *Labette County Commissioners* v. *Moulton*, 112 U. S. 217 (1884), one Moulton had recovered a judgment in the United States Circuit Court against a certain township, based upon bonds issued by that County Commissioners on behalf of that township. After this judgment he sought the issuance of a writ of mandamus commanding the County Commissioners to assess and collect a tax and to satisfy the said judgment.

The County Commissioners contended that, since they were not parties to the original action, the Circuit Court was attempting to exercise *original* jurisdiction in an action of mandamus and was therefore without jurisdiction.

In holding that the second action was merely ancillary to the original action and was therefore within the jurisdiction of the Circuit Court even though it was directed against new parties, this Court, at page 221, said:

> "The objection that the Circuit Court had no jurisdiction to issue its mandamus to the plaintiffs in error is based upon the supposition that because they are not parties to the judgment against Oswego Township, and are not officers of or representatives of that municipal corporation, but are officers of the County of Labette, the proceeding against them is the exercise of an original jurisdiction, which does not belong to that Court. It is quite true, as is familiar, that there is no original jurisdiction in the Circuit Court in mandamus, and that the writ issues out of them only in aid of a jurisdiction previously acquired, and is justified in such cases as the present as the only means of executing their judgments. But it does not follow because the jurisdiction in mandamus is ancillary merely that it cannot be exercised over persons not parties to the judgment sought to be enforced. An illustration to the contrary is found in that class of cases of which *Krippendorf* v. *Hyde*, 110 U. S. 276, is an example."

In the case of *Hoffman* v. *McClelland*, 264 U. S. 552, this Court, at page 558, took occasion to say that:

> "It is settled that where in the progress of a suit in a federal court, property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of settling up, protecting and enforcing their claims,—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene *pro interesse suo* or by a dependent bill. But in either case the proceed-

ing is purely ancillary. *Oklahoma* v. *Texas*, 258 U. S. 571, 581; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 632; *Krippendorf* v. *Hyde*, 110 U. S. 276, 281; *Compton* v. *Jesup*, 68 Fed. 263, 279; *Sioux City Co.* v. *Trust Co.*, 82 Fed. 124, 128; *Minot* v. *Mastin*, 95 Fed. 734, 739; Street Fed. Eq. Pr. §§ 1229, 1245-1247, 1364."

In the case of *Central Union Trust Company* v. *Anderson County*, 268 U. S. 93, this Court, in reversing a lower court holding that no such jurisdiction existed, took occasion to point out, at page 96, that:

> "* * * The rule permitting third persons to come into suits in federal courts to enforce their claims in respect of property there impounded is stated in *Hoffman* v. *McClelland*, 264 U. S. 552, 558: 'It is settled that where in the progress of a suit in a federal court property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of setting up, protecting and enforcing their claims,—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incidental to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene *pro interesse suo* or by a dependent bill. But in either case the proceeding is purely ancillary.' Ancillary suits are not limited to those initiated by persons who desire to come in and have their rights determined. Such a suit may be maintained by the plaintiff in the principal suit against strangers to the record to determine a controversy having relation to the property in the custody of the court and which, in justice to the parties before the court, ought to be determined in the principal suit. See *Compton* v. *Jesup*, 68 Fed. 263, 284, Street, Fed. Eq. Pr. § 1248."

To the same general effect, see:

Gunter v. *Atlantic Coast Line*, 200 U. S. 273.

Blair v. *City of Chicago*, 201 U. S. 400.

Wabash Railroad v. *Adelbert College*, 208 U. S. 38, 609.

In the case of *Inland Steel Co. v. United States*, 306 U. S. 153, an order of the Interstate Commerce Commission had been suspended by a three-judge court, conditioned, however, upon the railroad's setting up the disputed charges on its books and agreeing to pay such sums over if so ordered by the court.

In discussing the powers of the court to dispose of this fund, this Court, at pages 156, 157 and 158, said:

> "In the exercise of its discretion, the District Court imposed conditions in its decree granting appellant's petition for an interlocutory injunction. Appellant neither objected to the conditions nor sought review of the court's action in imposing them, but under the interlocutory injunction enjoyed for three years the suspension—which it had sought—of the Commission's order, pending litigation. Now, the litigation ended, appellant insists that the District Court lacked jurisdiction to do more than vacate its interlocutory injunction and dismiss the petition, since no pleadings of the Railroad or the Commission sought the creation of the special allowance account. *But this overlooks the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect.* * * *.
>
> "* * * While thus acting in the interest of a single shipper, the court properly took steps to protect the *other* interests—*represented by the Commission*—from injuries that the injunction might cause. It did so by ordering the payments, which the Commission had found unlawful, to be continued—on condition that they be segregated or paid into a separate account, pending the court's review of the Commission's finding of illegality. This segregated account thus accrued as a result of judicial restrain of administrative proceedings in which the payments had been declared unlawful. *When the court finally determined that the administrative findings and order were correct,* appellant could claim an interest in the fund only by asserting a right to payments forbidden by law, and *it*

became the duty of the court promptly to allocate the fund to its lawful owner.

*"An equity court having lawful control of a fund, in which there may be interests represented only by a duly authorized governmental agency, has the power and is charged with the duty of protecting those interests in disposing of the fund. * * *."* (Citing *Central Kentucky v. Railroad Comm'n*, 290 U. S. 264, 271.) (Emphasis added.)

In *United States v. Morgan*, 307 U. S. 183, in discussing "the proper disposition to be made of a fund paid into the Court below pending a suit instituted in that Court to set aside an order of the Secretary of Agriculture reducing scheduled rates for services rendered at the Kansas City Stockyards" (p. 185), this Court, at pages 197-198, said:

> "It is a power 'inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.' *Arkadelphia Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 146. See *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 219. What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution. *Northwestern Fuel Co.* v. *Brock*, supra; *Ex parte Lincoln Gas & Electric Co.*, 257 U. S. 6; *Baltimore & Ohio R. Co.* v. *United States*, 279 U. S. 781. And where by its injunction a court has compelled payment into its registry of amounts which may in pending proceedings be found not to have been due from those who paid them, we think justice equally requires the court to await the outcome of the proceedings in order that it may discharge the duty which it owes to the litigants and the public by avoiding unlawful disposition of the fund in the meantime, and ultimately distributing it to those found to be entitled to it. See *New York Edison Co. v. Maltbie*, supra; *Brooklyn Union Gas Co.* v *Maltbie*, supra; cf. *United States* v. *Klein*, 303 U. S. 276."

A case very similar on its controlling facts to the case at bar is the case of *Ex parte Lincoln Gas & Electric Co.*, 256 U. S. 512, where, at pages 516, 517 and 518, this Court said:

"The bond recognized that the city and its officials, who were the nominal parties defendant, were in a broad sense the representatives of the consumers, the parties actually concerned. It recognized that they were required to pay a rate for gas higher than the city ordinance had determined to be just and reasonable; that these excess charges were being exacted pending the suit, in order that the company might be secure in the event that it should prevail, and *per contra*, that they ought to be refunded with interest in the event that it should fail. *It recognized that the customers were so many in number, and the difficulty of sustaining their individual claims through separate suits would be so great, that to remit them to such suits would be a virtual denial of justice. And it recognized that to ascertain what should be due to them, to see to its collection from the Company in case of its failure to make good its attack upon the ordinance, and to cause distribution to be made among the several claimants, was essential to the doing of complete equity, and therefore a natural incident to the jurisdiction of the court in the main cause to retain jurisdiction for the purpose of requiring that restitution be made according to the terms of the bond was and is a necessary part of the duty of the District Court under the mandate.*

"The case is within the principle of *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 143-147.

"The contention that the jurisdiction fails because the consumers were not parties to the record nor in privity with the parties, and the company prayed no relief against them, is transparently unsound. The ordinance was intended to limit the gas rate for the benefit of the consumers; suit was brought against the municipality and its officers as the public representatives of the interests of the consumers; the restraining order and temporary injunction were intended for the very purpose of enabling the company to exact, pend-

ing suit, rates in excess of those limited by the ordinance; the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers; and the form of the supersedeas bond recognized all this, and was particularly designed for their protection.'" (Emphasis added.)

In the *dissenting* opinion in *Central States Co.* v. *City of Muscatine*, 324 U. S. 138, it was pointed out, at page 148, that:

> "* * * Until today, this Court seems never to have doubted that 'it is a power "inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process".' *United States* v. *Morgan*, 307 U. S. 183, 197. * * * That court (C. C. A., 7th) held, in impounding the fund here involved, that since it was authorized by §§ 19 (b) and (c) of the Act to issue a stay pending review of the Commission's rate order, it had a mandatory obligation as a court of equity 'to determine to whom and in what amounts the distribution shall be made.' This holding was in accord with 'the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect'." *Inland Steel Co.* v. *United States*, 306 U. S. 153, 157."

In view of these considerations, we respectfully submit that a Circuit Court of Appeals has exclusive jurisdiction over any fund which accrues by virtue of its stay order, and that it has adequate power to adjudicate the conflicting claims of the various public utilities and of the thousands of ultimate consumers to the moneys held in such a fund.

We therefore most respectfully submit that the *Central States* case, particularly if it extends to cases such as this, is inconsistent with the earlier (and we submit sounder) decisions of this Court.

(b) The Central States case, particularly if it extends to cases such as this, defeats the obvious intent of the Congress in enacting the Natural Gas Act.

In *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, this Court, at page 610, referring to the Natural Gas Act, pointed out that:

> "The *primary* aim of this legislation was to protect *consumers* against exploitation at the hands of natural gas companies." (Emphasis added.)

The present proceedings, being taken under the review provisions of the Natural Gas Act, the action of the court and the commission should represent a co-ordinated action to carry out, not to emasculate or defeat, the plain objectives of that Act. This principle is well brought out in *United States* v. *Morgan*, 307 U. S. 183, which involved the disposition of funds accumulated by virtue of a court action suspending an order of the Secretary of Agriculture reducing rates for services at the Kansas City stockyards. There this Court, at page 191, said:

> "* * * in construing a statute setting up an administrative agency and providing for judicial review of its action, the court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other *in securing the plainly indicated objects of the statute.* Court and agency are the means adopted to obtain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be constructed *so as to attain that end through co-ordinated action.*" (Emphasis added.)

Under the interpretation put upon the *Central States* case by the court below, whenever a Commission rate reduction order is stayed pending judicial review, the funds accumulated during the period of review (here four years)

must be distributed to the natural gas company's immediate purchasers to the exclusion of the ultimate consumers who contributed such funds in the form of excessive charges for gas service; without regard to whether these immediate purchasers were themselves "natural gas companies", or whether they were earning at least a fair return or the form and conditions of the stay order.

For that (four year) period, we submit that not only are the ultimate consumers deprived *pro tanto* of the protection from "exploitation at the hands of natural gas companies" which was the "primary aim" of the Natural Gas Act, but that Act is perverted into a law which exploits such ultimate consumers and unjustly enriches the natural gas companies.

This thought is well set forth in the *dissenting* opinion in *Central States Co.* v. *City of Muscatine*, 324 U. S. 138, where it was pointed out, at pages 146 and 151, that:

> "The *primary* purpose of Congress in passing the Natural Gas Act was to protect *ultimate consumers* of gas from excessive prices. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610, 612. *The Court's decision today defeats that Congressional purpose*, for under its interpretation of the Act the petitioner, a retail gas distributor, is awarded a windfall, at the expense of the very *consumers* the Act was designed to protect.
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> • • •
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> "If my previous analysis is correct, the rule announced by the Court today means simply this: *So long as litigation can be kept pending* in the courts as to the validity of a Federal Power Commission rate reduction order, *the benefits of the Natural Gas Act will be suspended as to ultimate consumers*, and will be largely, if not exclusively, restricted to retail distributors. *Thus*, by a strange quirk of statutory construction, *the effort of Congress to protect consumers* from excessive rates *is transformed*, where litigation is pending, *into an Act which exploits consumers and*

unjustly enriches distributing companies." (Emphasis added.)

In view of these considerations, we most respectfully submit that the *Central States* case, particularly if it extends to cases such as this, defeats the obvious intent of the Congress in enacting the Natural Gas Act.

(c) The Central States Case, particularly if it extends to cases such as this, encourages even frivolous litigation.

If the holding in the *Central States* case is to be construed as requiring that, in a case such as this, all funds accumulated under a stay order pending judicial review must be distributed to the immediate purchasers, to the exclusion of the ultimate consumers who contributed such funds, in the form of excessive charges, this will, we submit, furnish a powerful incentive to seek judicial review of a Commission rate reduction order, regardless of the frivolity of the grounds where, as here, the natural gas company, whose rates are ordered reduced, and one or more of its immediate purchasers are subsidiaries in a single operating system, a situation which is not uncommon in the natural gas industry. For instance, in the present case, Interstate is affiliated with Mississippi. The Standard Oil Company (N.J. owns 22.5% of Mississippi's stock as well as 53.97% of Interstate's stock and Mr. Frank H. Lerch, Jr., is president of both companies. See Record in *Interstate Natural Gas Co.* v. *Federal Power Commission*, No. 733, October Term, 1946, Vol. I, pp. 241, 242, 245, 247, 250, 254; Vol. II, pp. 706, 723. Where affiliation is present, the requirement that the impounded fund be distributed to immediate purchasers operates to retain that portion of the reduction within the holding company system, the sole consequence of the rate reduction order being merely

to shift the amount of reduction from the treasury of one subsidiary to that of another.

In view of these considerations, we respectfully submit that the *Central States* case, particularly if it extends to cases such as this, encourages even frivolous litigation.

(d) The Central States Case, particularly if it extends to cases such as this, should now be re-examined by this Court and either modified or disapproved.

If, notwithstanding the considerations set forth in Point I of the foregoing Petition and in this Brief in Support, this Court is of the opinion that the *Central States* case extends to the factual situation presented in the case at bar, then we most respectfully submit that this Honorable Court should now re-examine the holding and rationale of that case and either modify or disapprove it, so as to eliminate the patent injustice which presently is resulting from the impact of that decision upon this type of cases.

That this Court has, in cases involving this same Natural Gas Act, not hesitated to modify or even disapprove of earlier decisions in this field is demonstrated in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, where this Court, at pages 606-607, disapproved its earlier contrary ruling in *United Railways Co.* v. *West*, 280 U. S. 234, 253-254.

We therefore most respectfully submit that the *Central States* case, particularly if it extends to cases such as this is inconsistent with the earlier decisions of this Court, defeats the obvious intent of the Congress in enacting the Natural Gas Act, encourages even frivolous litigation and should now be re-examined by this Court and either modified or disapproved.

CONCLUSION.

We therefore most respectfully submit that the foregoing petition for a writ of *certiorari* should be granted.

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